

IN THE
COURT OF APPEALS OF INDIANA

FILED
MAR - 3 2008
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CAUSE NO. 49A02-0701-CR-110

MICHAEL HILL,

Appellant (Defendant below),

v.

STATE OF INDIANA,

Appellee (Plaintiff below).

Appeal from the Superior Court of Marion
County, Criminal Division, Room 6

Cause No. 49G06-0508-FA-144651

The Honorable Jane Magnus-Stinson,
Judge.

PETITION TO TRANSFER

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ISSUE PRESENTED ON TRANSFER

When faced with deciding between attempted child molestation or attempted sexual misconduct with a minor, did the jury give Defendant the benefit of the doubt based upon equivocal testimony regarding a victim's age?

STATEMENT OF RELEVANT FACTS

The State incorporates by reference the Statement of the Facts in its Brief of Appellee. As this Court noted in its opinion, P.C. testified she was born on January 2, 1992. Brenda, P.C.'s mother stated that P.C. was born on "2-1-92" (Tr. 80). Brenda also stated that P.C. might have been fourteen at the time of the incident, August 11, 2005 (Tr. 92). Brenda also told Defendant that P.C. was thirteen or fourteen when Defendant kept calling her (Tr. 91).

ARGUMENT

The State presented sufficient evidence.

In reviewing a sufficiency of the evidence claim, the standard of review is well settled. *Beeler v. State*, 807 N.E.2d 789, 791 (Ind. Ct. App. 2004). A reviewing court does not reweigh the evidence presented at trial or judge the credibility of the witnesses “and respects ‘the jury’s exclusive province to weigh conflicting evidence.’” *McHenry v. State*, 820 N.E.2d 124, 125 (Ind. 2005) (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). “Not only must the fact-finder determine whom to believe, but also what portions of conflicting testimony to believe.” *In re J.L.T.*, 712 N.E.2d 7, 11 (Ind. Ct. App. 1999). A defendant’s conviction will be affirmed if there is substantial evidence of probative value to support the conclusion of the fact finder. *Huber v. State*, 805 N.E.2d 887, 890 (Ind. Ct. App. 2004). Moreover, Article I, Section 19, provides that: “In all criminal cases whatever, the jury shall have the right to determine the law and the facts.” *Beavers v. State*, 236 Ind. 549, 141 N.E.2d 118, 564–65 (1957). Even when the State proves its case beyond a reasonable doubt, the jury, as finders of fact, is not required to convict. *Peck v. State*, 563 N.E.2d 554, 560 (Ind. 1994).

The jury reached a compromise verdict by convicting Defendant of the B felony instead of the A felony. The jury was free to disregard P.C.’s testimony regarding her birth date, as well as Brenda’s testimony, which was apparently the incorrect month and day. Brenda testified she had told Defendant P.C. was thirteen or fourteen. The jury obviously showed mercy and gave Defendant the benefit of the doubt regarding P.C.’s age. Defendant did not raise any issue when the jury returned with its verdict or poll the jury (Tr. 255). Nor did Defendant make any post-trial motions regarding the conviction or raise the issue on appeal. As the finders of fact and law, the jury reached the correct result. This court should not have addressed the issue *sua sponte*

when the jury reached its compromise verdict and Defendant did not complain. *See Hecht v. State*, 853 N.E.2d 1007, 1013 (Ind. Ct. App. 2006) (duty of reviewing court to raise issue of subject matter jurisdiction *sua sponte*); *Comer v. State*, 839 N.E.2d 721, 726 (Ind. Ct. App. 2005) (sentencing errors).

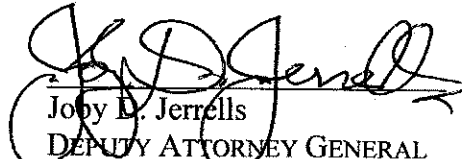
CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court grant rehearing and affirm the trial court in all respects.

Respectfully submitted,

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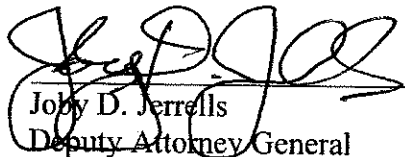

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Counsel for Appellee

Certificate of Service

I do solemnly affirm under the penalties for perjury that on March 3, 2008, I served upon the opposing counsel in the above-entitled cause two copies of the Petition to Transfer by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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